



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 12 OF 2020

JOSEPH AKWEYWA INDECHE.....1<sup>ST</sup> PETITIONER

JOSHUA MBOYA ASHIKANGA.....2<sup>ND</sup> PETITIONER

PIUS MUTOKA LUMUMBA.....3<sup>RD</sup> PETITIONER

PATRICK SHIKANGA LIKHOTIO.....4<sup>TH</sup> PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioners, were tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code on 14<sup>th</sup> September 2006. They were sentenced to death. This was later commuted to life imprisonment by the President in the year 2016.
2. Being dissatisfied with the said decision, they lodged an appeal in the Court of Appeal **Criminal Appeal No 371 of 2012**. The said Court dismissed their appeal in its entirety and upheld their conviction and sentence. On 10<sup>th</sup> February 2020, they filed an application for review of the sentence. In the affidavit that they swore in support of their application, they stated that based on the case of **Francis Karioko Muruatetu & Another vs Republic Petition No 15 of 2015**, the mandatory nature of death sentence was unconstitutional, inhumane and degrading.
3. They each filed separate Written Submissions. They subsequently filed further joint Written Submissions. The State also filed its Written Submissions.
4. The 1<sup>st</sup> Petitioner pleaded with the court to review his sentence to enable him reunite back with his family, which he explained, had endured hardship in getting their basic needs, lacked fatherly love and care as envisaged under Article 53 of the Constitution of Kenya 2010. He relied on the case of **John alias Kados vs Republic Petition No 53 of 2018** (eKLR citation not given).
5. He added that he had spent fifteen (15) years in custody and had undergone rehabilitation which would enable him integrate well back to society. He pleaded with court to consider the six (6) years he spent in remand during trial by invoking Section 333(2) of the Criminal Procedure Code.
6. The 2<sup>nd</sup> Petitioner submitted that prior to arrest he was a family man, a businessman running a hotel in Lubao Market and a political leader. He invoked Section 333(2) of the Criminal Procedure Code and urged the court to consider the time he spent in remand before conviction. He added that for the fifteen (15) years he had been in custody he had undergone rehabilitation and was ready to be integrated back to society.
7. The 3<sup>rd</sup> Petitioner submitted that he was the seventh (7<sup>th</sup>) born in a family of ten (10) and that prior to his arrest, he had a family of three (3) children and a wife. He added that he was a peasant farmer as well as the Vice-Chair of Ford Kenya in Lubao Sub-location.
8. He added that he had been in custody for sixteen (16) years and undergone rehabilitation and reformation programs and attained Diploma in Theology, Certificate on matters pertaining HIV/AIDS, Alcohol, and Drug Substance Abuse which would enable him not indulge in crime. He asserted that he was a first offender and was remorseful and urged the court to consider the time he spent in custody before conviction by invoking Section 333(2) of the Criminal Procedure Code. He pleaded with court to grant him another lease of life.

9. The 4<sup>th</sup> Petitioner submitted that he was a first offender and was arrested at the age of thirty two (32) years. He was now forty seven (47). He urged the court to consider the time he had spent in custody pursuant to Section 333(2) of the Criminal Procedure Code. He asked that his health status be taken into account because prior to his arrest, he was HIV/AIDS positive. He asserted that he had undergone rehabilitation while he was in custody which would enable him integrate well back to society and warn others on the dangers of getting involved in crime.
10. In their joint written submissions, they put emphasis on the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) and pleaded with court that their case had met the two-tier qualifications. They pointed out that they had a similar case to that of the petitioners in the aforesaid case as their case related to the mandatory nature of death sentence. They relied on the mitigating factors spelt out in the aforesaid case and submitted that they were all youths at the time of arrest and were all first offenders.
11. They urged the court to consider the time they had spent in remand while computing their sentence and in this regard, relied on the cases of **Cyprian Ingira Ikobwa vs Republic [2019] eKLR** and **Mwendwa Musili vs Republic [2020] eKLR** among other cases.
12. On its part, the State opposed the Petitioners' Petition for review of sentence for the reason that the circumstances in which the Petitioners committed the murder was quite heinous. It contended that the Petitioners jointly with others in an orchestrated attempt at causing injury to a family burnt a kitchen and in the process, ended up killing an innocent eight (8) year old boy and two (2) other people were severely injured.
13. It was its contention that the eleven (11) years served by the Petitioners was not enough rehabilitation in the circumstances. It urged the court to uphold the life sentence.
14. On 6<sup>th</sup> July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.
15. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
16. It further directed that in a re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.
17. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.
18. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.
19. Bearing in mind the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) and **The Sentencing Policy Guidelines, 2016** of the Judiciary, this court was satisfied that this was a suitable case for it to exercise its discretion to review the life sentence. Notably, in the case of **William Obondo Ochola vs Republic [2021] eKLR**, this very court found and held that the commutation of the death sentence to life imprisonment by the President in 2016 was an executive order and was not as a result of a judicial function.
20. Having noted that the Court of Appeal heard the Petitioners' Appeal before the mandatory death sentence in death sentences was found to have been unconstitutional in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), it was the considered view of this court the Petitioners herein were thus entitled to the benefit of re-sentencing by this court. Failure to review their sentence would be discriminatory and contrary to the provisions of Article 27(4) of the Constitution of Kenya, 2010 that prohibits any form of discrimination.
21. Notably, the deceased suffered greatly before he died. The murder can only be said to have been gruesome. It was so pre-meditated and malicious as the Petitioners attacked his father's home and torched the kitchen and in the process the innocent child died and two other people badly injured.
22. A perusal of the affidavit attached to the application for review of sentence did not show persons who were remorseful. They mainly focused on review of their sentences. This court took cognisance of the fact that one of objectives of punishment is retribution. Indeed, justice must not only be done for the deceased's family, but also be seen to be done.
23. Be that as it may, while there was need to send a strong message to the society that violence against other persons is strongly condemned, convicts who have reformed and are remorseful ought to be given a second chance and have a new lease of life.
24. The Petitioners had already spent about ten (10) years behind bars from the date of their sentencing and about six (6) years in remand. They obviously had had sufficient time to reflect on their actions. Although there was no letter filed in court by the officer in charge Kisumu Main Prison, they furnished the court with certificates showing that they had undergone rehabilitation programmes to enable them reintegrate well with the society when they will be released from prison.
25. Accordingly, taking all the factors into consideration, this court came to the firm view that a sentence of thirty (30) years imprisonment

for the Petitioners was fair in the circumstances of the case herein.

26. Their application for consideration of Section 333 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was previously inapplicable in this case as their sentence was life imprisonment. This was an indeterminate sentence where consideration of years spent in custody would have been a mere academic exercise. However, bearing in mind that their sentence could now be determined, the provisions of Section 333(2) of the Criminal Procedure Code was applicable herein.

27. Indeed, in the case of *Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR*, the Court of Appeal held that:

**“...By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced...”**

#### **DISPOSITION**

28. For the foregoing reasons, the upshot of this court’s decision was that the Petitioners’ Petition for review of the sentence that was filed on 10<sup>th</sup> February 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Petitioners for the offence of murder but reviews the mandatory death sentences that were each imposed upon them and replace the same with thirty (30) years imprisonment for each of them.

29. It is hereby ordered and directed that the period the Petitioners spent in custody, if at all, shall be taken into account when computing their sentences in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

30. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2021**

**J. KAMAU**

**JUDGE**